IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 22, 2002

DEXTER MCMILLAN v. TENNESSEE BOARD OF PROBATION AND PAROLE

Appeal from the Chancery Court for Davidson County
No. 01-1260-I Ellen Hobbs Lyle, Chancellor

No. M2001-01843-COA-R3-CV - Filed September 24, 2002

Petitioner filed a petition for writ of certiorari seeking review of a decision of the Board of Probation and Parole to revoke his parole nearly three years after the decision of the Board was rendered. He alleged that he suffered from a disability that effectively tolled the statute of limitations. The Board filed a motion to dismiss and the trial court granted the motion by finding that the petition was untimely and failed to state a claim for which relief could be granted. Because the petitioner failed to allege facts sufficient to invoke the operation of the tolling statute, Tenn. Code Ann. § 28-1-106, and failed to state a claim for which relief can be granted, we affirm the trial court's decision.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed and Remanded

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which BEN H. CANTRELL, P.J., M.S., and WILLIAM C. KOCH, JR., J., joined.

Dexter L. McMillan, Clifton, Tennessee, Pro Se.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; Stephanie R. Reevers, Associate Deputy Attorney General, for the appellee, Tennessee Board of Probation and Parole.

OPINION

This appeal was brought by Dexter McMillan, an inmate in the custody of the Department of Correction, from the trial court's dismissal of his petition for writ of certiorari seeking judicial review of the proceedings of the Board of Probation and Parole revoking his parole. Mr. McMillan was paroled on June 3, 1997. Three days later, he was served with a parole violation warrant for violating two conditions of his parole: (1) failure to obtain permission from his parole officer before changing his residence or employment; and (2) failure to carry out lawful instructions. A preliminary hearing was held on the revocation warrant, where a letter was submitted from the residential

program or halfway house to which Mr. McMillan had been released stating he had left the program after a short time and had not spent the night there. A final revocation hearing was held November 10, 1997; Mr. McMillan's parole was revoked; and his next parole consideration was set for May 1998. Although Mr. McMillan's petition for writ of certiorari was not filed until April of 2001, it seeks review of the Board's revocation decision made November 18, 1997.

The trial court dismissed the petition because: (1) it was not filed within the jurisdictional sixty (60) day limit established in Tenn. Code Ann. § 27-9-102; and (2) it failed to state a claim upon which relief could be granted.

I. Tolling of the Statute of Limitations

On appeal, Mr. McMillan asserts the sixty (60) day statute of limitations should be tolled because he was placed in the psychiatric unit at the Department's Special Needs Facility on January 2, 1998, and was given strong tranquilizers and other medication for depression.

Tenn. Code Ann. § 27-9-102 provides that a petition for writ of certiorari must be filed within sixty (60) days of the order or decision complained of. The sixty (60) day time limit is jurisdictional. *Thandiwe v. Traughber*, 909 S.W.2d 802, 804 (Tenn. Ct. App. 1994).

Mr. McMillan argues that the statute should be tolled because of his mental condition and its treatment. The trial court found that Mr. McMillan had failed to allege sufficient facts to support a conclusion that the statute should be tolled because he had failed to allege how long his disability lasted or why three years elapsed between the revocation of his parole and the filing of his petition.

Statutes of limitation exist in order to "ensure fairness to the defendant by preventing undue delay in bringing suits on claims and by preserving evidence so that facts are not obscured by the lapse of time or the defective memory or death of a witness." *Jacobs v. Baylor Sch.*, 957 F. Supp. 1002, 1008 (E.D. Tenn. 1996) (citing *Quality Auto Parts Co., Inc. v. Bluff City Buick Co., Inc.*, 876 S.W.2d 818, 820 (Tenn. 1994)). In order to "take into account the possible harshness of a perfunctory application of a statute of limitations," the General Assembly has enacted what are referred to as tolling statutes. *Jacobs*, 957 F. Supp. at 1008.

Tenn. Code Ann. § 28-1-106 is one such tolling statute that allows for a statute of limitations to be tolled as a result of minority or a disability. In its entirety, Tenn. Code Ann. § 28-1-106 provides:

> If the person entitled to commence an action, is at the time the cause of action accrued, either under the age of eighteen (18) years, or of unsound mind, such person, or such person's representative and privies, as the case may be, may commence the action, after the removal of such disability, within the time of limitation for the particular cause of action, unless it exceeds three (3) years, and in that case within three (3) years from the removal of such disability.

Thus, the language of Tenn. Code Ann. § 28-1-106 requires that a plaintiff's disability exist at the time the cause of action accrued for the tolling provision to apply. The courts have interpreted the statute accordingly.

> The general rule, which is subject to some exceptions, is that when a right of action has accrued, and there are parties competent to sue and be sued, limitations begin to run and will continue to do so notwithstanding any subsequent disability; the provisions suspending the operation of limitations, or extending the period, in favor of persons under disability are confined to disabilities existing at the time the cause of action accrues to such person.

Jacobs, 957 F. Supp. at 1009 (citing *Foster v. Albright*, 631 S.W.2d 147, 150 (Tenn. Ct. App. 1982)). *See also* Tenn. Code Ann. § 28-1-108 (stating that in order to claim use of a disability, it must exist at the time the cause of action accrued); *Watkins v. State*, 903 S.W.2d 302, 304-05 (Tenn. 1995) (holding that the savings provisions of Tenn. Code Ann. § 28-1-106 tolled the statute of limitations when the petitioner filing for post-conviction relief was of unsound mind at the time the cause of action accrued); *Foster v. Allbright*, 631 S.W.2d 147, 150 (Tenn. Ct. App. 1982) (holding that the general rule is that the tolling statute only applies if the disability existed at the time the cause of action accrued); *Owen v. Summers*, No. W2001-00727-COA-R3-CV, 2001 Tenn. App. LEXIS 953, at *22-*23 (Tenn. Ct. App. Dec. 28, 2001) (no Tenn. R. App. P. 11 application filed) (stating that in order to toll the statute of limitations on a real property action brought pursuant to Tenn. Code Ann. § 28-2-102, the plaintiff must be of unsound mind at the time the right of action accrued); *Nix v. State*, No. 03C01-9901-CR-00044, 2000 Tenn. Crim. App. LEXIS 227, at *5 (Tenn. Crim. App. Mar. 15, 2000) (no Tenn. R. App. P. 11 application filed) (holding that in a post-conviction proceeding a petitioner must allege facts that "warrant a legal conclusion that the petitioner was mentally incompetent . . . at all times material to the statute of limitations in order to take advantage of Tenn. Code Ann. § 28-1-106").

The trial court dismissed the petition filed by Mr. McMillan as untimely because he failed to allege sufficient facts to support a conclusion that the statute should be tolled and because he failed to allege how long his disability lasted or why three years elapsed between the revocation of his parole and the filing of his petition. Mr. McMillan bears the burden of proving he was of unsound mind during the entire time necessary to toll the statute. *Parham v. Walker*, 568 S.W.2d 622, 624 (Tenn. Ct. App. 1978). In other words, Mr. McMillan must have shown that his disability existed at the time his cause of action arose and lasted at a minimum, until sixty (60) days prior to the date on which he filed his petition.

To the extent Mr. McMillan's petition alleges he was of unsound mind,[1] it does not allege that he suffered from this disability on November 18, 1997. In fact, the first mention of the disability in the technical record is found in Mr. McMillan's response to the Department's motion to dismiss wherein Mr. McMillan states that "Petitioner had no knowledge to file [the] petition, as petitioner had a nervous breakdown in December of 1997, and was sent to Special Needs Facility" on January 2, 1998. In the instant case, Mr. McMillan's petition has not alleged facts sufficient to show that he suffered from an unsound mind at the time his cause of action to file a petition for common law writ of certiorari accrued, in this case on November 18, 1997, when the Board rendered its decision. For that reason, he is not able to take advantage of the tolling provision of Tenn. Code Ann. § 28-1-106 and, therefore, the trial court was correct in determining that his petition, filed nearly three years after the cause of action accrued, was untimely.

II. Failure to State a Claim

Even though the trial court dismissed the petition on jurisdictional grounds, it also dismissed the petition for failure to state a claim for relief.

A Tenn. R. Civ. P. 12.02(6) motion to dismiss for failure to state a claim upon which relief can be granted tests only the legal sufficiency of the complaint, not the strength of the petitioner's proof. *Cook v. Spinnaker's of Rivergate, Inc.*, 878 S.W.2d 934, 938 (Tenn. 1994). The basis for the motion is that the allegations contained in the complaint, considered alone and taken as true, are insufficient to constitute a cause of action. *Id.* In resolving the issues in this appeal, we are required to construe the complaint liberally in the plaintiff's favor and take the allegations of the complaint as true. *Bell v. Icard, Merrill, Cullins, Timm, Furen, and Ginsburg, P.A.*, 986 S.W.2d 550, 554 (Tenn. 1999). Our standard of review on appeal from a trial court's ruling on a motion to dismiss is *de novo*, with no presumption of correctness as to the trial court's legal conclusions. *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn. 1997).

No prisoner has a right to be released on parole prior to the expiration of his or her sentence. *Robinson v. Traughber*, 13 S.W.3d 361, 364 (Tenn. Ct. App. 1999). Parole is a privilege, and the power to decide to release a prisoner on parole rests with the Board of Probation and Parole, not the courts. *Hopkins v. Tenn. Bd. of Paroles & Prob.*, 60 S.W.3d 79, 82 (Tenn. Ct. App. 2001). Accordingly, because parole decisions are entirely discretionary, *Richardson v. Tenn. Dep't. of Corr.*, 33 S.W.3d 818, 820 (Tenn. Ct. App. 2000), *Daniels v. Traughber*, 984 S.W.2d 802, 803 (Tenn. Ct. App. 1998), the only vehicle for obtaining judicial review of the Board's decisions is a common law

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[1] Courts have defined what is meant by "unsound mind" by stating:

> Whether a person is of unsound mind, then focuses on two components. First, is the person alleged to be of unsound mind incapable of attending to any business? Second, is the person alleged to be of unsound mind incapable of taking care of herself?

Jacobs, 957 F. Supp. at 1010.

writ of certiorari. *Thandiwe*, 909 S.W.2d at 803. Therefore, the scope of our review is defined not only by the trial court's grant of the motion to dismiss, but also by the procedural vehicle Mr. McMillan correctly utilized to assert his claim, the petition for common law writ of certiorari. Under such a petition, a court's review of administrative agency decisions is very limited.

A petition for common law writ of certiorari limits the scope of review to a determination of whether the Board exceeded its jurisdiction or acted illegally, fraudulently, or arbitrarily. *Turner v. Tenn. Bd. of Paroles*, 993 S.W.2d 78, 80 (Tenn. Ct. App. 1999); *South v. Tenn. Bd. of Paroles*, 946 S.W.2d 310, 311 (Tenn. Ct. App. 1996); *Powell v. Parole Eligibility Review Bd.*, 879 S.W.2d 871, 873 (Tenn. Ct. App. 1994). The petition does not empower the courts to inquire into the intrinsic correctness of the Board's decision. *Robinson*, 13 S.W.3d at 364; *Turner*, 993 S.W.2d at 80. Thus, the courts will not use the common-law writ to grant relief when the Board's decision was arrived at in a constitutional and lawful manner. Tenn. Code Ann. § 40-28-115(c); *Arnold v. Tenn. Bd. of Paroles*, 956 S.W.2d 478, 480 (Tenn. 1997); *Powell*, 879 S.W.2d at 873.

Mr. McMillan argues there were two deficiencies in the parole revocation proceedings and decision. First, he claims that his right to due process was violated in that: (1) he was not provided counsel even after he made a written request for appointment of counsel; and (2) although he testified in his behalf he was denied the opportunity to testify "further." Second, he asserts there was insufficient evidence because his testimony and that of his sister rebutted the testimony presented in support of parole revocation.

After Mr. McMillan was served with a parole violation warrant, a preliminary hearing was held June 30, 1997. Prior to that hearing, while he was incarcerated on the warrant, Mr. McMillan completed an inmate request form asking for appointment of counsel for that hearing. The form indicates a response that he must request appointment of an attorney at the hearing and the hearing officer would decide if appointment is warranted. The Preliminary Hearing Summary indicates that no attorney was requested at the hearing. In his petition Mr. McMillan asserts that he made a formal request for counsel in writing. We note that request was made to his jailers, not the Board, and he was advised he was required to request counsel from the hearing officer. Mr. McMillan does not allege in his petition that he made such a request at the hearing. He does allege that the hearing officer was required to state the reason for denial of counsel. Obviously, if the hearing officer was not asked to appoint counsel, she was not required to state a reason for denying a request that was not made.

The hearing summary of the final revocation hearing indicates that Mr. McMillan's attorney, William Hatton, was present at the hearing. A close reading of Mr. McMillan's petition indicates he did not allege he was denied counsel at the revocation hearing. In his brief he alleges he was denied competent counsel. Mr. McMillan even included a copy of a letter he received in response to a complaint he filed against Mr. Hatton with the Board of Professional Responsibility.

Mr. McMillan alleged that at the revocation hearing he rebutted the testimony of his parole officer "with his own testimony that such events were misconstrued and did not amount to a

violation per se." He alleged that he testified at the hearing that he could not have resided at the halfway house because it was overcrowded and, under emergency circumstances, stayed with his girlfriend and that he had permission from a parole supervisor to do so. He alleged his sister testified to the same effect. He also alleged that, "after submission of testimony, the Petitioner desired to speak further on his own behalf, in addition to the testimony already offered, but was nonetheless denied such an opportunity by the Board."

A. Due Process

A claim of denial of due process must be analyzed with a two-part inquiry: (1) whether the interest involved can be defined as "liberty" or "property" within the meaning of the Due Process Clause; and, if so (2) what process is due in the circumstances. *Board of Regents v. Roth*, 408 U.S. 564, 571-73, 92 S. Ct. 2701, 2706-07 (1972). Deprivation of an interest which is neither "liberty" nor "property" does not trigger the procedural safeguards of the Due Process Clause.

The United States Supreme Court and the Tennessee Supreme Court have recognized that "the full panoply of rights due a defendant" in criminal prosecutions do not apply to parole revocations. *State v. Wade*, 863 S.W.2d 406, 407-08 (Tenn. 1993) (citing *Black v. Romano*, 471 U.S. 606, 613, 105 S. Ct. 2254, 2258 (1985)). A parolee facing revocation of parole is entitled to certain minimal due process rights, including: (a) a notice of the claimed violations; (b) the disclosure of evidence against him; (c) the opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross examine adverse witnesses; (e) a neutral and detached hearing body; and (f) a written statement by the fact finders as to the evidence relied on and reasons for revoking parole. *Gagnon v. Scarpelli*, 411 U.S. 778, 786, 93 S. Ct. 1756, 1761-62 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S. Ct. 2593, 2604 (1972); *Wade*, 863 S.W.2d at 408.

Mr. McMillan was paroled on June 3, 1997. Three days later, he was served with a parole violation warrant for violating two conditions of his parole; number (6) and number (7) on the parole certificate issued to Mr. McMillan at the time of his parole; which stated:

> (6) I will get the permission of my parole officer before changing my residence or employment, or before leaving the county of my residence or the state.
>
> (7) I will allow my parole officer to visit my home, employment site, or elsewhere, and will carry out all lawful instructions he/she gives and report to my parole officer as instructed, and will carry out all lawful instructions of the Administrative Case Review Committee, and will submit to electronic monitoring or community service if required.

A preliminary hearing was held on the revocation warrant. The hearing summary indicates that Mr. McMillan pled not guilty to violations of rules 6 and 7 and the parole officer submitted a letter from the residential program or halfway house to which Mr. McMillan had been released

stating he had left the program after a short time and had not spent the night there. The summary's section entitled "summary of evidence and testimony in behalf of parolee" states:

> Mr. McMillan testified that he talked to his parole officer the 28th [of June]. She told him that the only placement that could be approved was to the Steps Program. He left the prison the 3rd of June and stayed at his girlfriend's house that night. He called Ms. Stargel [his parole officer] after arriving at the halfway house and she told him she could meet with him June 5 for initial intake interview. He said he was uncomfortable with the program and felt very uneasy riding the bus. He talked to Ms. Stargel's supervisor who told him that any alternative living arrangement would have to be checked out. This was confirmed by his sister who had accompanied him to the parole office.

The hearing officer that presided over the preliminary hearing found probable cause for a final revocation hearing based on the evidence presented. The form also indicates that Mr. McMillan did not request counsel.

A final revocation hearing was held November 10, 1997, wherein the Board revoked Mr. McMillan's parole. The "notice of board action/time setting/post parole rescission hearing" form revoking Mr. McMillan's parole indicates that Mr. McMillan again pled not guilty to violations of rules 6 and 7 and that his attorney, William Hatton, was present at the hearing. The Board revoked Mr. McMillan's parole and rescheduled his next parole hearing date for May of 1998. The form, in the section entitled "summary of the evidence" states: "P.O.'s [parole officer's] evidence and testimony" and indicates the reason for the revocation as violations of rules (6) and (7).

In his brief on appeal, Mr. McMillan argues that he was denied counsel and that he was denied the right to speak on his behalf in violation of his due process rights. As set out above, the record indicates that Mr. McMillan was represented by counsel at the revocation hearing. His petition does not claim otherwise. His claim of denial of counsel relates to his request prior to the preliminary hearing. Again, the record does not reflect that he made that request to the hearing officer, and his petition does not dispute that. He has failed to state a due process claim.

In addition, although Mr. McMillan claims he was not allowed to speak in his defense, he also admits he testified at both hearings. His complaint is that he wanted another opportunity to testify in order to rebut other evidence. We find no basis for a claim of denial of due process.

The petition and accompanying documents submitted by Mr. McMillan indicate that he was notified of and aware of the charges against him, and that he was given the opportunity to testify on his own behalf and to present other evidence at the preliminary revocation hearing, and was otherwise provided with the applicable due process rights. Thus, we find Mr. McMillan failed to state a claim of denial of due process.

B. Correctness of Decision

Mr. McMillan's primary complaint is with the sufficiency of the evidence supporting the revocation decision. Although evidence was presented that he failed to comply with the conditions of parole, he argues that his testimony and that of his sister rebut that evidence. In essence, he asked the trial court and asks this court to reweigh the evidence and reach a different conclusion. This argument is an attack on the correctness of the Board's decision. Courts cannot review the correctness of the lower tribunal's decision in a common law writ of certiorari proceeding.

> It is not the correctness of the decision that is subject to judicial review [under a common law writ of certiorari], but the manner in which the decision is reached. If the agency or board reached its decision in a constitutional or lawful manner, then the decision would not be subject to judicial review. . . .

Powell, 879 S.W.2d at 873. *See also Cooper v. Williamson County Bd. of Educ.*, 746 S.W.2d 176, 179 (Tenn. 1987) (explaining that "the scope of review under the common law writ does not ordinarily extend to a redetermination of the facts found by the administrative body"). Accordingly, Mr. McMillan's allegations regarding the sufficiency of the evidence supporting revocation of his parole do not state a claim for relief.

Mr. McMillan has alleged no facts supporting a claim that the board exceeded its jurisdiction or acted illegally, fraudulently, or arbitrarily. He has also alleged no facts warranting a review of the manner in which the Board reached its decision to revoke his parole. Consequently, Mr. McMillan has failed to state a claim for which relief can be granted and, therefore, we affirm the decision of the trial court granting the motion to dismiss filed by the Board.

III. Conclusion

The decision of the Chancery Court dismissing the petition is hereby affirmed and the cause is remanded for any further proceedings which may be necessary. The costs of the appeal are taxed to the appellant, Dexter McMillan, for which execution may issue if necessary.

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PATRICIA J. COTTRELL, JUDGE